In the

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HARRY CRAINE,
Appellant,
v.
PACIFIC STEAMSHIP COMPANY, a Corporation, and
OLIVER CHILLED PLOW WORKS, a Corporation,
Appellees.

Supplemental Brief of Oliver Chilled Plow Works, Defendant in Error.

Upon Writ of Error to the United States District Court of the District of Oregon.

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Since the brief in behalf of the above named defendant in error was prepared and forwarded to the Clerk of this Court, the plaintiff in error served his printed brief upon attorneys for the defendant in error on the 4th day of February, 1922, to which the defendant in error begs leave to make brief reply.

At the outset, the plaintiff in error makes a misstatement of the case.

On page 1 and 2 of plaintiff's brief, the following statement is made: "The complaint alleges that the defendant in error, the Plow Company, as shippers, consigned to the 'City of Topeka' *a shipment of potato diggers,* and that it carelessly and negligently left on *one* of the potato diggers, a sharp knife or blade, which, in making such shipment, would ordinarily have been removed or boxed in."

A reference to the complaint, (Paragraph V thereof), discloses the variance between what the plaintiff claims in his brief and what he alleged in his complaint. In the complaint it is alleged (Paragraph V), "That on or about the 22nd day of September, 1920, defendant, Oliver Chilled Plow Works, was shipping *a certain potato digger* manufactured by the said defendant to one of its customers by the defendant PACIFIC STEAMSHIP COMPANY." The evident purpose of this statement in plaintiff's brief, is to have the Court draw an inference not warranted by any allegations in the complaint, that a number of potato diggers were consigned at the same time, all of which were properly crated or boxed, except one, which was left in a dangerous condition. Neither is there anything in the complaint tending to indicate that the potato digger, which is alleged to have caused the plaintiff's injury, was packed or crated other than in the ordinary way potato diggers are crated and shipped.

The contention is also made by plaintiff in error in his belated brief, that the duty is cast upon the shipper to notify the common carrier of the dangerous condition of goods, and his failure to do so, gives a cause of action in favor of the common carrier's servants. If that were true, which it is not, the complaint would not state a cause of action upon that theory, because the complaint does not allege a failure of the Plow Company to notify the Steamship Company of the alleged dangerous condition of the article shipped. The brief erroneously states that

the complaint has this allegation. In the statement of the case appears the following: "The complaint also alleged as to the Plow Company that it carelessly and negligently failed to notify the Steamship Company or the Steamship Company's servants of the presence of the alleged sharp blade." A reference to the complaint will disclose that there is no such allegation, but the complaint alleges merely that the Plow Company did not warn the plaintiff of the supposed danger. It is upon the supposition that the complaint charges a failure to warn the Steamship Company, that the appellant's argument is based. The following appears in the argument: "While in these opinions there is expressed a divergence of views upon the question whether the shipper warrants the fitness of the goods offered to be handled by the carrier and his servants, all of the members of the court agree, and therein they are sustained by all the cases discussed in the opinion, that it is a settled proposition at common law that the shipper is liable for negligence if he fails either to make the shipment reasonably safe, or advise the carrier of its dangerous condition." Later on in the argument occurs the following: "If it (The Plow Company) had warned the carrier of the danger incident to handling the article then it might have been said that it was free from negligence, but since it failed to do so, it was negligent, and its negligence is actionable."

The cases cited in appellant's brief in support of his contention, in so far as we have examined them, do not sustain appellant's contention that a cause of

action is stated in this complaint against the Plow Company. We have not examined the English case cited, so we do not know whether it is in point or not. If this case supports appellant's contention, its holding is certainly opposed to the rule adopted by the American courts. The cases cited in appellant's brief, which we have examined, fall within two classes,—cases where a servant is suing his master, or cases where the accident occurred through the unsafe condition of premises, which premises were under the control of the defendant, and the plaintiff was an invitee upon the premises. Under such circumstances the law creates a duty upon the part of the person in control of the premises to exercise ordinary care in keeping the premises safe, so as not to injure anyone entering them upon his invitation.

The case of *Pioneer Steamship Co. v. McCann,* 170 Fed. 873, cited in appellant's brief, is a case where an employee of a stevedore sued to recover for an injury caused by the unsafe condition of the vessel. The Plaintiff was injured on the vessel in the discharge of his work, and the negligence of the defendant was in leaving the vessel in a condition unsafe for unloading.

In *Middleton v. Ross,* 213 Fed. 6, the Court held that an invitee had a cause of action against one in control of premises where the injury occurred through the dangerous condition of the premises.

These cases do not dispute our proposition in the least. The Plow Company delivered the plow to the dock, and its duties immediately ceased, and it had

no more control over the premises or over the direction of the loading of the ship.

Gekas v. O. W. R. & N. Co., 75 Or., 243, was an action by a servant against his master for failing to provide safe tools with which to work.

The case of *International Mercantile Co. v. Fels,* 170 Fed. 275, cited in appellant's brief, was an action by a carrier against a shipper for shipping explosives without informing the carrier of the nature of the cargo. The Court held, after a consideration of the evidence, that a disclosure as to the nature of the cargo was made by the shipper, and he was not liable. This case is not in point for three reasons: First, it was an action by the carrier against the shipper, and not by the carrier's servant; second, the nature of the article was an explosive, which, we have shown, comes within the class of imminently dangerous articles; and third, the bill of lading provided that the shipper should be liable for injuries caused by shipping dangerous goods without making full disclosure as to their nature.

None of the cases we have mentioned above dispute any of the propositions made in our brief. We respectfully submit that the Plow Company is not shown to be liable to the plaintiff by the allegations of the complaint.

Respectfully submitted,

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George A. Pipes,

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